

COMMENTS

IN DEFENSE OF THE FAMILY: AN ARGUMENT FOR MAINTAINING THE PARENTAL RIGHTS OF INCARCERATED WOMEN IN TEXAS

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I. Introduction.....	194
II. Child Protective Services.....	198
A. CPS Procedures.....	199
B. Public Policy.....	202
III. The Law in Relation to the Parent-Child Relationship	204
A. The Adoption and Safe Families Act of 1997.....	204
B. Statutory Provisions in Texas.....	205
1. Interpretation of the Statute by Texas Courts	208
2. The Clear and Convincing Evidence Standard.....	212
3. The Reasonable Efforts Standard.....	214
4. The Rights of the Child and the Best Interest Standard.....	215
IV. The Impact on Incarcerated Women.....	218
V. Proposal.....	221
VI. Conclusion.....	226
Appendix.....	229

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I. INTRODUCTION

The number of women in prisons across the United States has significantly increased in the past decade. For example, the female population in state prisons increased by 75% between 1986 and 1991.¹ In 1998, approximately 942,000 women were being held in correctional facilities across the United States.² As the population of women in prison increases, so does the number of incarcerated mothers.³ Approximately 65% of state female prisoners and 60% of federal female prisoners have at least one minor child.⁴ The number of state female prisoners with children increased from about 27,000 in 1991 to 48,000 in 1999,⁵ while the number for federal female prisoners with children increased from approximately 3,000 to 5,000.⁶ As a result, there are approximately 1.5 million children with mothers in prison across the United States.

As a former caseworker for Child Protective Services (CPS), some of the cases I was most concerned with were those involving the removal and eventual termination or relinquishment of parental rights as a result of a parent's incarceration.⁷ My commitment to my job as a caseworker

1. See TRACY L. SNELL, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-145321, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, SURVEY OF STATE PRISON INMATES, 1991: WOMEN IN PRISON 1 (1991).

2. See LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-17688, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, WOMEN OFFENDERS 6 (1999). Women offenders accounted for 16% of the 5,890,300 correctional population in 1998. See *id.*

3. See Barbara Bloom, *Imprisoned Mothers*, in CHILDREN OF INCARCERATED PARENTS 21 (Katherine Gabel & Denise Johnston eds., 1995) (stating that an estimated 75% to 80% of women in prisons across the United States are mothers); see also David Crary, *Community Prison Puts Moms, Kids Together*, RECORD (Northern New Jersey), at A28 (reporting that the number of incarcerated women nearly doubled to 84,427 between 1990 and 1998); Heidi Morales, *Advocacy Group Wants More Access to Kids for Moms in Jail*, CHI. DAILY HERALD, Dec. 13, 1999, at 5, available at 1999 WL 26409448 (citing statistics reporting that approximately two-thirds of 150,000 incarcerated women are mothers).

4. See CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-182335, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000) (estimating that 65.3% and 58.8% of state and federal female prisoners, respectively, had at least one minor child); SNELL, *supra* note 1, at 1.

5. See MUMOLA, *supra* note 4, at 3 (showing that the number of state female prisoners with minor children increased from 26,600 in 1991 to 48,500 in 1999).

6. See *id.* at 2 (showing that the number of federal female prisoners with minor children increased from 2,900 in 1991 to 5,100 in 1999).

7. During a family visit at one of the women's prison facilities in Gatesville, Texas, I observed a "good-bye" visit between a mother and her eighteen-month old daughter. A "good-bye" visit is a final visit between a parent and a child prior to permanent separation. By this time, the parent has already relinquished her rights or had her rights terminated by the state. After the visit, with tears swelling in her eyes, the mother related to us that she had sadly relinquished her rights to her child because she was going to be in prison for

continually increased at the sight of families being separated for reasons other than an allegation of abuse or neglect.⁸ Many of the families I worked with included incarcerated mothers and fathers, who inevitably lost most or all contact with their children.⁹ As a caseworker, it was my job to ensure that the children continued to visit or maintain contact with their parents, even when adverse factors surrounding visitation were present. Setting up visits for parents in jail or prison not only took a great deal of effort, but also took a significant amount of time and planning since many of the facilities are located far from the counties where the children reside.¹⁰ Prior to receiving a case involving an incarcerated parent, I never realized how easy it was for the State to tear families apart, yet so difficult for the State to put families back together.

awhile and had no family to help care for her daughter in the meantime. She said her daughter would soon be adopted and that she would never be able to see her again.

8. *In re D.T.* is an example of a case in which a child was removed from a home for reasons other than abuse and neglect. See *In re D.T.*, 34 S.W.3d 625 (Tex. App.—Fort Worth 2000, no pet. h.) (recognizing that the removal of the child was a result of the mother's incarceration alone); see also Diana S. Young & Carrie J. Smith, *When Moms are Incarcerated: The Needs of Children, Mothers, and Caregivers*, 81 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVS., Mar. 1, 2000, available at 2000 WL 15451302 (noting the increase in removal of children from their homes as a result of parental incarceration). See generally Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 462 (1997). Braveman and Ramsey suggest that some families face removal of their children by the state as a result of their poverty alone. See *id.* The authors also discuss the link between poverty and abuse and neglect, and suggest that poverty is generally associated with conditions that could support removal of a child. See *id.* at 461.

9. See Kathleen J. Block & Margaret J. Potthast, *Girl Scouts Beyond Bars: Facilitating Parent-Child Contact in Correctional Settings*, 77 CHILD WELFARE: J. POL'Y, PRAC. & PROGRAM 561, 563 (1998) (noting the difficulty incarcerated women have with maintaining contact with their children); BARBARA BLOOM & DAVID STEINHART, NAT'L COUNCIL ON CRIME AND DELINQUENCY, *WHY PUNISH THE CHILDREN? A REAPPRAISAL OF THE CHILDREN OF INCARCERATED MOTHERS IN AMERICA* 17 (1993) (indicating that incarcerated mothers have little to no contact with their children, even when they retain custody); SUSAN DELLER ROSS, ET AL., *THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO WOMEN'S RIGHTS* 235 (3d ed. 1993) (arguing that, in the absence of legislation, many incarcerated women are deprived from having contact with their children). The words "child" and "children" will be used interchangeably throughout this comment.

10. See generally Adela Beckerman, *Charting a Course: Meeting the Challenge of Permanency Planning for Children with Incarcerated Mothers*, 77 CHILD WELFARE: J. POL'Y, PRAC. & PROGRAM 513 (1998) (citing caseworkers' difficulty in helping children maintain visitation with incarcerated parents). In addition, there are other factors that make visitation problematic. For example, children and teenagers visiting their parents in prison facilities are required to present a birth certificate or valid picture identification, sometimes making it impossible to visit when the child or teenager has just entered foster care. When children enter foster care, most of them enter without a birth certificate or any valid form of identification. CPS must then order birth certificates or wait until a teenager enters school in order to obtain a picture identification. This process often takes over a month.

There are several grounds for the involuntary termination of parental rights.¹¹ One of the primary reasons CPS moves toward termination is because the child's caregiver is incarcerated.¹² The Texas Family Code (TFC) provides that parental rights can be terminated on the basis of a parent's incarceration for two or more years, so long as the court deems it in the child's best interest.¹³ The Texas statute predominantly affects single parents who have complete care, custody and control of their children, frequently causing a disparate impact on single mothers.¹⁴

Termination proceedings consist not only of going through the legal process of termination, but also the emotionally-wrenching process of helping both the children and the family deal with the effect of permanent separation.¹⁵ Therefore, all of those involved are severely impacted both physically and psychologically. The incarceration of a parent caregiver, compounded by a subsequent termination of parental rights, impacts the well-being of a child more severely than incarceration alone.¹⁶

11. See TEX. FAM. CODE ANN. § 161.001 (Vernon 1996 & Supp. 2000).

12. See *id.* at § 161.001(1)(Q) (allowing a court to order termination as a result of a parent's incarceration for more than two years); see also The Legal Aid Society's Prisoners' Rights Project, *Testimony of the Legal Aid Society on the Effects of Incarceration on Families*, at http://www.legal-aid.org/testimony5_30.htm (last visited May 30, 2000) (stating that "[n]ot only does incarceration keep families apart, it can lead to the complete dissolution of the family when the State terminates parental rights").

13. See TEX. FAM. CODE ANN. § 161.001(1)(Q).

14. See MUMOLA, *supra* note 4, at 2. The report shows that only 43.8% of state male inmates and 55.2% of federal male inmates lived with their children at the time of admission, compared with 64.3% of state and 84% of federal women inmates who resided with their child at the time of admission. See *id.* See also Philip M. Genty, *Termination of Parental Rights among Prisoners: A National Perspective*, in CHILDREN OF INCARCERATED PARENTS 167 (Katherine Gabel & Denise Johnston eds., 1995) (reporting that there has been a historically disproportionate difference in the sentencing, time served, and custody determination of women prisoners compared to their male counterparts); Denise Johnston, *The Care and Placement of Prisoners' Children*, in CHILDREN OF INCARCERATED PARENTS 104 (Katherine Gabel & Denise Johnston eds., 1995) (stating that approximately 75% of incarcerated women and 50% of incarcerated men "lived with at least one minor child prior to incarceration").

15. See Ana M. Novoa, *Count the Brown Faces: Where Is the "Family" in the Family Law of Child Protective Services*, 1 SCHOLAR 5, 22 (1999) (citing Wendy Clockner Kates et al., *Whose Child Is This?: Assessment and Treatment of Children in Foster Care*, 61 AM. J. ORTHOPSYCHIATRY 584 (1991)) (arguing that the harm resulting from removing a child from their home can potentially be greater than "the harm for which they were removed from their homes").

16. See Genty, *supra* note 14, at 167; see also Zachary Dowdy, *Moms Behind Bars: As Female Population Grows, So Does the Number of Displaced Children*, CHI. TRIB., Aug. 18, 1999, at B1 (reporting an increased likelihood of termination for incarcerated women); Molly Weiser, *Mothering from Behind Bars*, PLAIN DEALER, May 21, 2000, at 4G (noting

Although a difficult consequence of incarceration, a parent is generally better able to deal with the idea of restricted visitation than with termination.¹⁷ Subsequently, the possibility that termination will occur because of incarceration is a greater restriction on a parent's freedom to rear her child than a parent's right to see her child.¹⁸ For the parent, the termination of his or her parental rights is often seen as an additional sentence.¹⁹

This comment focuses on the parental rights of incarcerated women in Texas and proposes that changes in CPS policy and court procedure be made to ensure that these rights are protected. The purpose of this comment is to demonstrate that the incarceration of a mother, for reasons other than abusing or neglecting her child, is not enough to terminate her parental rights, regardless of the length of her incarceration. This comment will attempt to provide guidance to Texas courts and CPS caseworkers when determining whether reasonable efforts have been made in termination cases. In addition, this comment presents a step-by-step approach to assessing the "reasonable efforts standard" imposed by the Texas Family Code.

Part II explains the functions of CPS, and discusses its policies and procedures. Additionally, Part II examines CPS policy applicable to cases involving the removal of a child and specifically discusses the steps that must be taken in order to preserve the family. This section also looks at the extended family's role in helping to maintain the mother-child relationship in termination cases. Part III analyzes statutory and case history and examines the trend in Texas regarding the termination of parental rights with regard to incarcerated parents. The comment then focuses on the applicable Texas Family Code provision, and suggests that the provision allowing for termination of incarcerated parents' rights expands procedures set forth by CPS. Part III also looks at the effect of a mother's

that women in prison are more likely to lose their rights to their children than women who are not in prison).

17. See Interview with Brenda, Member, Texas Inmate Families Association (TIFA), in San Antonio, Tex. (Apr. 16, 2001) (on file with author). The names of those who were interviewed for this comment were changed to protect their privacy. See also Gabrielle deGroot, *A Day in the Life: Four Women Share Their Stories of Life Behind Bars*, CORRECTIONS TODAY, Dec. 1998, at 84 (reporting that the goal for most women in prison is to reunite with their children upon their release).

18. See Interview with Brenda, *supra* note 17; deGroot, *supra* note 17.

19. See Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 748 (2000) (stating that the civil sanctioning of already convicted individuals is like receiving an "additional criminal sentence"); see also Weiser, *supra* note 16 (writing that women receive a "double punishment" upon their incarceration); Morales, *supra* note 3, at 5 (adding that children, as well as women, are punished upon a mother's incarceration, since children are being stripped of their mother's nurturing ability).

incarceration on her child while attempting to weigh a mother's parental rights against the best interest of the child and the family.

Part IV discusses the rights of incarcerated women and looks at how these women have been treated from a historical viewpoint. It also compares the impact of incarceration on mothers with fathers.

Part V presents a step-by-step approach to assessing the "reasonable efforts standard" imposed by the Texas Family Code. The proposal incorporates applicable law, CPS policy, and related child protection issues to present a framework for determining whether reasonable efforts to preserve the family have been made in termination cases.

II. CHILD PROTECTIVE SERVICES

A division of the Texas Department of Protective and Regulatory Services (the Department), Child Protective Services is the state agency charged with investigating reports of child abuse and neglect.²⁰ Child protective services are "[s]pecialized casework services to neglected, abused, or exploited children and their families."²¹ These services focus on rehabilitating the home environment and preserving the family by addressing the family dynamics resulting in abuse or neglect.²²

When a parent is arrested, the first contact with CPS occurs when workers travel to the home of the arrested parent.²³ Workers may either supervise the transition of custody from the arrested parent to a parent or

20. See TEX. FAM. CODE ANN. § 261.301 (Vernon 1996 & Supp. 2000); see also *id.* § 264.002(a)(1) (establishing that one of the Department's duties is to protect abused and neglected children); AM. HUMANE ASS'N, *HELPING IN CHILD PROTECTIVE SERVICES: A COMPETENCY-BASED CASEWORK HANDBOOK* 386 (Judee Filip et al. eds., 1992) (defining Child Protective Services as providing "a specialized child welfare service . . . [and] legally responsible for investigating suspected cases of child abuse and neglect, and intervening in confirmed cases").

21. See TEX. FAM. CODE ANN. § 264.201(a)(1)-(4) (Vernon 1996 & Supp. 2000) (extending the Department's powers of prevention, alleviation, and reunification in their provision of services to families); see also AM. HUMANE ASS'N, *supra* note 20, at 4; DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, *CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS* 25-38 (1992), available at <http://www.calib.com/nccanch/pubs/usermanuals/cpswork/cpswork.pdf> (last visited May 15, 2001).

22. See TEX. FAM. CODE ANN. § 264.201(a)(1)-(4). This section of the code extends to the Department the powers of prevention, alleviation, and reunification in their provision of services to families. See *id.* See also AM. HUMANE ASS'N, *supra* note 20, at 4; DEPANFILIS & SALUS, *supra* note 21, at 25-38.

23. See Barbara Bloom, *Public Policy and the Children of Incarcerated Parents*, in *CHILDREN OF INCARCERATED PARENTS* 279 (Katherine Gabel & Denise Johnston eds., 1995).

to a caregiver who resides with the children; however, if such placement cannot be made, the children are then placed in CPS' care.²⁴

A. CPS Procedures

Through the investigative process, the Department examines the child, assesses whether the s/he is at risk of harm, and determines whether protection is warranted by conducting an interview with the child and the parent.²⁵ The investigation involves determining the type, cause, and extent of abuse, the parties involved (including the perpetrator and the victim), and the parent's ability to maintain a safe environment for the child.²⁶ In addition to conducting risk-assessments, CPS has the discretion to provide family-preservation services to families in order to reduce the likelihood of future abuse and neglect, which could cause the removal of the child from the home.²⁷

Upon a finding of abuse, neglect, or a threat to the child's health and safety, CPS can remove a child from the parent or caretaker's home prior to obtaining a court order if presented with an emergency.²⁸ When not presented with an emergency, the court must first make a general finding, among other things, that there is an immediate danger to the health and

24. *See id.*

25. *See* TEX. FAM. CODE ANN. § 261.301(e). The Family Code states:

(e) As necessary to provide for the protection of the child, the department or designated agency shall determine:

- (1) the nature, extent, and cause of the abuse or neglect;
- (2) the identity of the person responsible for the abuse or neglect;
- (3) the names and conditions of the other children in the home;
- (4) an evaluation of the parents or persons responsible for the care of the child;
- (5) the adequacy of the home environment;
- (6) the relationship of the child to the persons responsible for the care, custody, or welfare of the child; and
- (7) all other pertinent data.

Id. *See also* 40 TEX. ADMIN. CODE § 700.507 (1999) (outlining the information gathered during the investigative process).

26. *See* TEX. FAM. CODE ANN. § 261.302 (Vernon 1996 & Supp. 2000) (outlining the requirements under which the Department must conduct its investigations); *see also* 40 TEX. ADMIN. CODE § 700.507 (1999) (delineating the investigation process); DEPAÑILIS & SALUS, *supra* note 21, at 5-6 (1992); Tex. Dep't of Protective & Regulatory Servs., *Agency Overview*, at http://www.tdprs.state.tx.us/About...1_Reports/leg99htm/About.htm (last visited Oct. 11, 2000).

27. *See* TEX. FAM. CODE ANN. § 264.002; 40 TEX. ADMIN. CODE §§ 700.702-703 (1999); *see also* Tex. Dep't of Protective & Regulatory Servs., *About PRS*, at http://www.tdprs.state.tx.us/About...1_Reports/leg99htm/Definitions.htm (last visited Oct. 11, 2000).

28. *See* TEX. FAM. CODE ANN. § 262.104 (detailing the conditions that must be present in order to remove a child for emergency reasons); *see also id.* at § 262.001 (authorizing the Department to file a Suit Affecting the Parent-Child Relationship (SAPCR)).

safety of the child before issuing an order authorizing the state's possession of a child.²⁹

Regardless of the method in which a child is removed from the home, once removed, a child is either placed in an emergency shelter or a foster home.³⁰ CPS is charged with attempting to locate a relative upon a child's removal, especially in situations where the parent, who is the primary caretaker of the child, is incarcerated.³¹ If CPS locates a relative, they are required to conduct a background check and home study similar to those required before an adoption.³² This requirement is not only required by the TFC, but also federally mandated by the Adoption and Safe Families Act of 1997.³³ Failure to pass the background check is an automatic disqualification for placement of the child.³⁴ Similarly, not meeting the standards of the home study will exclude a family from being seen as a possible placement for the child.

29. *See id.* § 262.102. CPS is also authorized to obtain a court order prior to taking the appropriate actions to remove a child from the home. *See id.* In a case where removal is not necessary prior to obtaining a court order, CPS legally removes the child from the care of the parent by obtaining a court order granting the state temporary custody and restricting the parent's rights to visit the child. *See id.* Following the granting of the order, CPS then takes action necessary to take possession of the child or children. *See id.* § 262.001(a).

30. *See* TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., 2000 ANNUAL REPORT, available at http://www.tdprs.state.tx.us/About_PRS/PRS_Statistics_&_Annual_Reports/2000 (last visited Apr. 14, 2001) (indicating that children are placed in foster homes, emergency shelters, or assessment centers when no relatives are available for placement after the child's removal).

31. *See* TEX. FAM. CODE ANN. § 263.306(a)(5) (Vernon 1996 & Supp. 2000) (establishing a requirement that the court evaluate the Department's progress in locating relatives with whom the Department can place the child); *see also* Joseph R. Carrieri, *Social Worker's Legal Handbook*, in CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 2000: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM; THE ATTORNEY'S ROLE AND RESPONSIBILITIES 120-21 (Practicing Law Inst. ed., 2000) (discussing a recent statute requiring the court to look at relative placements before placing a child in foster care).

32. The TFC mandates that a social study of a potential adoptive family be conducted. *See* TEX. FAM. CODE ANN. § 162.003. The social study must include a complete assessment of the home environment of the potential adoptive parent. *See id.* § 162.003(b). The TFC also mandates that a criminal history report be conducted of any individual petitioning for placement or adoption. *Id.* § 162.085. *See also* 40 TEX. ADMIN. CODE § 700.520(b) (1999) (allowing CPS to conduct a criminal background check for home studies); DEPANFILIS & SALUS, *supra* note 21, at 56-58.

33. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 106, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter Safe Families Act] (applying the requirement for a criminal records check for prospective placements); TEX. FAM. CODE ANN. § 162.085; 40 TEX. ADMIN. CODE § 700.520(b) (1999).

34. Failure to successfully pass a criminal history report may render you ineligible for placement of a child in your home. *See* TEX. FAM. CODE ANN. § 162.085.

Soon after a child's removal from the home, CPS will establish a service plan³⁵ which is to be filed no later than the forty-fifth day after the Department has been named Temporary Managing Conservator.³⁶ Along with the filing of the service plan, CPS establishes a Permanency Plan for the child.³⁷ A Permanency Plan is the overall goal for the child and is included in the Permanency Progress Report, which states exactly what the child's parents must do in order to regain custody of their child.³⁸ Included in the Report is a description of the permanency plan for the child, including but not limited to termination, permanent foster care or family reunification, and recommended actions necessary to ensure that the plan is met by a certain period of time.³⁹

CPS can also implement a departmental goal of termination.⁴⁰ In most cases, however, the decision to move towards termination of a parent's rights occurs in cases where the abuse or neglect of the child is deemed to be severe or in cases when the parent or parents have had little or no

35. See *id.* § 263.102.

36. See *id.* § 263.101.

37. See *id.* § 263.102; 40 TEX. ADMIN. CODE § 700.1310 (1999); see also *In re J.N.R.*, 982 S.W.2d 137, 140 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (providing that TDPRS create a permanency plan soon after the parent's release from prison). A permanency plan will be included in the service plan and will, for example, implement a goal of family reunification and establish ways by which the parents can reach that goal for their family. See TEX. FAM. CODE ANN. § 263.3025. Upon establishing a plan of service, a parent is asked to successfully complete tasks that include: family therapy, individual therapy, parenting classes, maintenance of full-time employment, and weekly visitation with their child. See *id.* § 263.102(a)(9). This section allows for the inclusion of any other terms or conditions necessary for successful completion of the service plan. See *id.*

38. The requirements of the permanency plan and permanency progress report are outlined in the Texas Family Code. See TEX. FAM. CODE ANN. §§ 263.3025, .303 (Vernon 1996 & Supp. 2000); see also 40 TEX. ADMIN. CODE § 700.1310 (1999) (outlining the requirements for permanency planning).

39. See TEX. FAM. CODE ANN. § 263.303. The code states in part:

- (b) the permanency progress report must:
 - (1) recommend the suit be dismissed; or
 - (2) recommend that the suit continue, and:
 - (A) identify the date for dismissal of the suit under th[e] chapter; . . .
 - (C) evaluate the parties' compliance with temporary orders and with the service plan; . . .
 - (E) describe the permanency plan for the child and recommend actions necessary to ensure that a final order consistent with that permanency plan is rendered before the date for dismissal of the suit; . . .

Id.

40. See TEX. FAM. CODE ANN. § 263.102(a)(5)(B). The Department is required to complete a service plan once it is appointed as managing conservator of a child. See *id.* § 263.101. The service plan can include a statement by the Department establishing that the plan's goal is termination of parental rights. See *id.* § 263.102(a)(5)(B).

involvement towards achievement of their permanency plan goals.⁴¹ The parent is generally required to exceed the requirements established by CPS in order to change their permanency plan goal.⁴² Generally, parents involved in cases set for termination due to the extreme nature and circumstances of the abuse or neglect are not likely to be successful in having that plan changed.

B. Public Policy

The Child Protective Services caseworker's primary responsibility is to protect children while helping to stabilize and strengthen families.⁴³ Moreover, intervention by a CPS caseworker is intended to focus on empowering families so that they can help themselves gain control over their lives, while also ensuring that the family can provide a safe home to which the child can return.⁴⁴ In order for the caseworker to perform these tasks effectively, casework must be performed in the context of the family's cultural and social background.⁴⁵ Therefore, the services a caseworker provides are more effective when focused on the child, the family, and the family's cultural norms.⁴⁶

It is believed that protection of the family and maintenance of familial relationships is "important to [the] physical and emotional development of the child."⁴⁷ Unfortunately, most of the children who enter substitute

41. See TEX. FAM. CODE ANN. §§ 161.001, 263.102(a). The list of reasons the State can use to terminate parental rights includes lack of participation toward service plan goals. See *id.* In a plan with the goal of termination of parental rights, the parents will still be required to participate in certain programs such as therapy, visitation, and parenting classes. See *id.* § 263.102(a)(7).

42. See generally *id.* § 263.303(b)(2)(C); see also Novoa, *supra* note 15, at 5.

43. See 40 TEX. ADMIN. CODE § 700.1301 (1999); see also AM. HUMANE ASS'N, *supra* note 20, at 20; DEPANFILIS & SALUS, *supra* note 21, at 5-6; TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., *supra* note 30, at 9-18 (introducing Child Protective Services as part of the agency that focuses on the safety of children and on family stability).

44. See 40 TEX. ADMIN. CODE § 700.1301 (1999); AM. HUMANE ASS'N, *supra* note 20, at 30; TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., *supra* note 30, at 9-18; see also Tex. Dep't of Protective & Regulatory Servs., *Description of Child Protective Services Program*, at http://www.tdprs.state.tx.us/About_PRS/State_Plan/3cpsp00.asp#familybased (last visited May 16, 2001) (claiming that one of the Department's goals includes "promoting integrity and stability of families" while making efforts to protect the child without removing him from the home).

45. See AM. HUMANE ASS'N, *supra* note 20, at 20; see also Beckerman, *supra* note 10, at 521 (recommending that case management handbooks incorporate methods for caseworkers to incorporate a family's cultural background into their case planning).

46. See AM. HUMANE ASS'N, *supra* note 20, at 30; see also Beckerman, *supra* note 10, at 521.

47. See Braveman & Ramsey, *supra* note 8, at 451; see also Susan Greene et al., *Cycles of Pain: Risk Factors in the Lives of Incarcerated Mothers and Their Children*, 80 PRISON J.

care⁴⁸ as a result of a parent's incarceration, end up in foster care if no relatives or family friends are available for placement of the child.⁴⁹ Yet, placement of a child with relatives increases the likelihood that a child will have continued contact with his mother⁵⁰ and that an incarcerated mother's rights will not be terminated.⁵¹ Therefore, a family's plan of service should solely incorporate a goal of relative placement.⁵² Faced with the notion that the number of children placed with grandparents more than doubles upon a mother's incarceration without intervention by CPS, the Department should act in accordance with this trend and make relative placement a priority.⁵³ The reality, however, is that state agencies will not usually place children in homes where family members have

3 (2000) (discussing the various negative effects that parental incarceration has on children).

48. See 40 TEX. ADMIN. CODE § 700.1301 (1999) (stating that substitute care is placement anywhere outside of the child's home, including placement with relatives, a foster family, an emergency shelter, or an assessment center); see also Tex. Dep't of Protective & Regulatory Servs., *supra* note 26.

49. See TEX. FAM. CODE ANN. § 263.306(a)(3)-(5) (Vernon 1996 & Supp. 2000); Ellen Barry et. al, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 148-49 (Katherine Gabel & Denise Johnston eds., 1995); Carrieri, *supra* note 31, at 120; Julie A. Norman, *Children of Prisoners in Foster Care*, in CHILDREN OF INCARCERATED PARENTS 124 (Katherine Gabel & Denise Johnston eds., 1995); see also Tex. Dep't of Protective & Regulatory Servs., *Description of Child Protective Services Program*, *supra* note 44 (affirming that children will be placed in foster care if no relative or family friend is available to take the child).

50. See Cynthia Seymore, *Children with Parents in Prison: Child Welfare Policy, Program and Practice Issues*, 27 CHILD WELFARE: J. OF POL'Y, PRAC. & PROGRAM 473 (1998). Seymore notes that incarcerated parents whose children are placed with relatives often maintain contact with their children by phone calls and letters. See *id.* at 473. Seymore notes, however, that relatives often have difficulty facilitating visits, and face problems with affordability of transportation. See *id.* In addition, relatives are sometimes unwilling to facilitate visits. See *id.*

51. See Bloom, *supra* note 3, at 26. But see CATHERINE CONLY, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ17858, THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES 7 (1998) (noting that an incarcerated woman has a greater chance of having her parental rights terminated).

52. See Barry et al., *supra* note 49, at 151 (Katherine Gabel & Denise Johnston eds., 1995); see also Young & Smith, *supra* note 8 (discussing a report stating that kinship care is seen as a step towards family preservation rather than placement).

53. See Johnston, *supra* note 14, at 107. More than 50% of the children of incarcerated mothers are placed with grandparents, more often the maternal grandmother, compared with only 25% placed with fathers. See *id.* See also BLOOM & STEINHART, *supra* note 9, at 16 (writing that most children separated from their mothers go live with their grandmothers); Young & Smith, *supra* note 52 (noting that grandmothers often become the kinship care providers when a mother is incarcerated).

a history of criminal conduct⁵⁴ despite the Department's goals of family preservation.

III. THE LAW IN RELATION TO THE PARENT-CHILD RELATIONSHIP

The termination of a relationship between a parent and child is a final and irrevocable process by which the state divests a parent of all legal rights to their child.⁵⁵ Termination is therefore considered the most severe action brought by the State against a parent.⁵⁶ Furthermore, the termination of a parent's right to their child results in the revocation of a parent's privileges, duties, and powers with respect to their child.⁵⁷

A. *The Adoption and Safe Families Act of 1997*

In 1997, the federal government enacted the Adoption and Safe Families Act of 1997 (ASFA) "to promote the adoption of children in foster care" by creating certain financial incentives to states.⁵⁸ ASFA modifies the reasonable efforts standard required in child protection cases and reduces the time a state agency has to reunify a child with his family.⁵⁹ ASFA states that if a child is placed in foster care for fifteen of the last

54. See Denise Johnston & Katherine Gabel, *Incarcerated Parents*, in CHILDREN OF INCARCERATED PARENTS 14 (Katherine Gabel & Denise Johnston eds., 1995).

55. See *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re B.S.T.*, 977 S.W.2d 481, 483 (Tex. App.—Houston [14th Dist.] 1998, no pet.). *Holick* asserts that termination is an action that cannot be reversed. See *Holick*, 685 S.W.2d at 20; see also Carrieri, *supra* note 31, at 78-79 (stating that termination severs a parent's legal rights and the bond between a parent and child).

56. See *In re B.S.T.*, 977 S.W.2d at 483 (noting that a termination action "is a drastic remedy"); see also Ahrens, *supra* note 19, at 737 (stating that denying one "the ability to maintain [a] relationship with their children [is] among the sternest penalties a society can impose" on an individual).

57. See *Holick*, 685 S.W.2d at 20; *In re B.S.T.*, 977 S.W.2d at 483; see also Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 312 (1998) (stating that "[t]ermination of parental rights has severe ramifications in that it permanently severs the parent-child relationship, rendering the parent . . . unable to participate in the child's life").

58. Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.); see also Phillip M. Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations*, 77 CHILD WELFARE: J. OF POL'Y, PRAC. & PROGRAM 543, 551 (1998) (describing the changes ASFA made to the Adoption Assistance and Child Welfare Act of 1980).

59. See Safe Families Act, Title I § 103(a)(3)(E) (1997) (codified as amended in scattered sections of 42 U.S.C.); see also Beckerman, *supra* note 10, at 514-16 (describing the effects that the Adoption and Safe Families Act of 1997 has on permanency planning timelines); Genty, *supra* note 58, at 551-52 (discussing the details of the ASFA); Paula Dressel et al., *Mothers Behind Bars*, CORRECTIONS TODAY, Dec. 1998, at 90 (stating that the shortening of time a state has to reunify a child with his family almost certainly results in permanent separation). ASFA amended 42 U.S.C. § 675(a)(3)(E) in the following manner:

twenty-two months, the state shall file a petition for termination of the parental rights.⁶⁰ Although ASFA appears strict on its face, it provides the following limited exceptions: the state has the discretion to not file the petition if (1) the child is in the care of a relative, (2) the state has documented a compelling reason for why the termination would not be in the best interest of the child, or (3) the state has not provided a sufficient amount of time for the parent's successful completion of the service plan.⁶¹ However, in a situation where a parent is incarcerated for at least fifteen months, the state has the discretion to file a petition for termination, even if it is determined that reasonable efforts to preserve the family have not been made.⁶²

B. Statutory Provisions in Texas

As a result of the adoption of ASFA, the Texas Family Code permits termination of parental rights upon a parent's incarceration for a specific period of time⁶³ and allows for termination even when the reason for incarceration did not involve abuse or neglect of a child.⁶⁴

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant, . . . the State shall file a petition to terminate the parental rights of the child's parents, . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption.

Id.

60. See Safe Families Act, § 103(a)(3)(E) (1997) (codified as amended in scattered sections of 42 U.S.C.); see also Judge Ernestine S. Gray, *The Adoption and Safe Families Act of 1997: Confronting an American Tragedy*, 46 LA. B.J. 477 (1999) (outlining the various requirements of ASFA); Dowdy, *supra* note 16, at 8 (describing the fifteen month time limit required by the ASFA).

61. See Safe Families Act, § 103(a)(3)(E)(i)-(iii).

62. See Safe Families Act, § 103(a)(b)(E); see also Gray, *supra* note 60, at 480 (listing the factors for which the reasonable efforts requirement does not apply); Shawn L. Raymond, Note, *Where are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement? Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1259-60 (1999) (discussing situations in which the state does not have to make reasonable efforts to return a child to his or her home).

63. In Texas, the period is two or more years. See TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon 1996 & Supp. 2000). Under ASFA, termination can begin after the fifteenth month from the child's placement in foster care or from the initial filing of the petition. See Safe Families Act, § 103(a)(3)(E); see also Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 658 (1999) (listing greater numbers of visits between an incarcerated parent and child when the child is placed with a relative).

64. See Safe Families Act, § 103(a)(3)(E). Note the use of "or" between the different elements available to file a petition for termination. See *id.* For example, if a woman receives a sentence of three years in prison for committing check fraud and cannot make arrangements for placement of her child prior to detention, she will face intervention by

In most states, termination of a parent's rights is deemed necessary only when the parent endangers the child so as to threaten or effect the child's well being or when termination is believed to be in the best interest of the child.⁶⁵ However, section 161.001(1)(Q) of the Texas Family Code provides for termination of parental rights in situations where a parent, either a mother or a father, is sentenced to prison for two or more years.⁶⁶ The statute states that the court may order termination if it finds, by clear and convincing evidence, that the parent "knowingly engaged in criminal conduct that has resulted in the parent's conviction of an offense and confinement or imprisonment and inability to care for the child for not less than two years."⁶⁷ A simple conviction will not result in termination of parental rights,⁶⁸ rather, the parent must be given a sentence that includes incarceration.⁶⁹

CPS, who will place her child in foster care. See, e.g., *In re D.T.*, 34 S.W.3d 625 (Tex. App.—Fort Worth 2000, no pet. h.).

65. The *Boyd* court defined 'to endanger' as "jeopardiz[ing] the child or expos[ing] the child to loss or injury." See Tex. Dep't of Human Servs. v. Boyd 727 S.W.2d 531, 533 (Tex. 1987); see also *In re K.C.M.*, 4 S.W.2d 392, 394 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (defining endanger as "expos[ing] the child to loss or injury or to jeopardize" the child's safety). Accord *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (*per curiam*) (writ of error denied, Jan. 31, 1997); *In re D.E.G.*, No. 01-99-00143-CV, 2000 WL 145109 (Tex. App.—Houston [1st Dist.] Feb. 10, 2000, n.w.h.) (not designated for publication).

66. See TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon 1996 & Supp. 2000). This section of the Texas Family Code was created as a result of the enactment of the Adoption and Safe Families Act of 1997. See Safe Families Act, Pub. L. No. 105-89, I § 101(a)(15)(B), 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.) (establishing that reasonable efforts shall be made on the part of the Department to preserve and reunify families); Dowdy, *supra* note 16. The Adoption and Safe Families Act of 1997 provides federal funding to states who comply with its requirements. See *id.* Massachusetts, for example, was set to receive approximately 100 million dollars in federal aid as a result of its compliance with the ASFA. See *id.*

67. See TEX. FAM. CODE ANN. § 161.001.

68. Note the use of the word "and" between parts (i) and (ii) signifies that both need to be present in order to allow termination. Therefore, a parent who commits any offense against anyone other than their child, and serves no prison state jail sentence, can still maintain parental rights over their child. In addition, if a parent is convicted of an offense and incarcerated for less than two years, the parent is still able to maintain their parental rights over their child as long as they meet the requirements outlined in the service plan submitted by CPS if the Department intervenes.

69. Compare TEX. FAM. CODE ANN. § 161.001(1)(Q) (establishing that there be a conviction and incarceration), with TEX. FAM. CODE ANN. § 161.001(1)(L) (outlining the various convictions for which parent's rights can be terminated); see also Carrieri, *supra* note 31, at 172-73 (stating that loss of custody occurs upon incarceration as a result of a felony conviction).

One of the biggest issues affecting incarcerated parents' ability to reunite with their children is the term for which they are sentenced.⁷⁰ Texas has adopted the Permanency Planning Initiative, which resulted in the implementation of a timeline, at the end of which a child must have a permanent living arrangement.⁷¹ Upon intervention by CPS, the child's permanency plan may require termination of parental rights unless CPS can locate a relative for placement.⁷² However, the placement of a child with a relative or family friend is dependent upon the successful completion of a home study⁷³ and a favorable background check.⁷⁴ Therefore, those that are most affected by the statute are parents who do not have friends or relatives willing or able to take custody of their children.⁷⁵ Similarly, parents who have family or friends willing to take the child, but whose background or home environment does not fall within the stan-

70. See Norman, *supra* note 49, at 125-26. The longer a parent is incarcerated, the longer the disruption for the child and the more difficult it will be to have the state return the child home. See *id.* at 126; see also Dowdy, *supra* note 16, at 8 (stating that the longer women remain in prison, the greater chance they have of losing their children); Tex. Dep't of Protective & Regulatory Servs., *supra* note 44.

71. See TEX. FAM. CODE ANN. § 263.401(a) (Vernon 1996 & Supp. 2000) (codifying the final order requirement upon reaching the one year deadline); see also TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., *supra* note 30, at 11 (outlining the Texas Permanency Planning Initiative's goal); Tex. Dep't of Protective & Regulatory Servs., *supra* note 44 (listing the various types of permanency plan goals).

72. See TEX. FAM. CODE ANN. § 263.006 (providing that the court inform the parents that their rights could be subject to termination if the child cannot return to a safe environment); see also Tex. Dep't of Protective & Regulatory Servs., *supra* note 44 (describing CPS' options when a non-custodial parent or relative is not found or is unable to care for the child).

73. See TEX. FAM. CODE ANN. §§ 107.051-.052. These sections provide the court with the power to appoint the Department or another person to conduct a social study of an individual requesting possession of a child. See *id.* The TFC states that the study must contain the child's physical, sexual, and/or emotional history. See *id.* § 107.052(b).

74. See TEX. FAM. CODE ANN. § 107.052 (stating that the study should comply with the Department's standards, guidelines and procedures); see also 40 TEX. ADMIN. CODE § 700.520(b) (1999) (providing CPS with the authority to request a criminal background check from the Texas Department of Public Safety or local law enforcement). The Department's policy requires that a criminal background check be conducted on every individual requesting possession of a child. See *id.* § 700.520(b)(3).

75. See Investigative Reports, *Women in Prison* (A & E television broadcast, Mar. 26, 2001) (on file with author). Kristie Camp, incarcerated at the Central California Women's Facility in Madero, California, is serving time for murdering her physically abusive husband. See *id.* When asked how often she saw her children, Ms. Camp responded: "I don't get to see them at all because they were awarded to my mother-in-law who adopted them since I didn't have family for them to go to." *Id.*

dards set forth by the Department, will not be certified as a possible placement.⁷⁶

While the Texas statute greatly affects single parents that have complete care, custody, and control of their children, it also has a profound effect on the future of the child and the family unit as a whole.⁷⁷ Furthermore, the statute impacts women who do not have an extended family or network of friends willing or able to intervene before the state removes the child from the home, placing the child in foster care.⁷⁸ Although the Texas Administrative Code requires CPS to locate relatives for placement, CPS is not required to do so under the TFC.⁷⁹ Therefore, in an attempt to "speed-up" the process, CPS can defer to section 161.001(1)(Q) and use it as a tool for immediately requesting termination, thereby circumventing the need to locate an alternative placement.⁸⁰ The repercussions are profound—if a parent cannot make arrangements for placement of their child with a relative or family friend prior to being incarcerated, CPS *can* remove that child and immediately proceed towards termination of parental rights.⁸¹

1. Interpretation of the Statute by Texas Courts

Some courts agree that the overall effect of section 161.001(1)(Q)⁸² is too severe and that imprisonment should not be the only factor used in electing to terminate a parent's rights.⁸³ Nevertheless, termination most often occurs when women are incarcerated for a significant period of time.⁸⁴ The recent trend in Texas courts has been to expand the stan-

76. See TEX. FAM. CODE ANN. § 107.052(b) (stating that the study should comply with the Department's standards, guidelines and procedures).

77. See *id.* § 263.006 (providing that the court shall warn parents of the possibility of termination if the parents are unable to provide a safe environment for the child).

78. See, e.g., 40 TEX. ADMIN. CODE § 700.1313 (1999) (stating that permanent placement with relatives will occur if there is a relative or friend "willing and able to (A) protect the child; (B) assume responsibility for the child's care and upbringing; and (C) either adopt the child or accept permanent managing conservatorship"); see also MUMOLA, *supra* note 4, at 3 (citing that 2.4% of state and 1.3% of federal inmates had children placed in a foster home or other similar placement).

79. Compare TEX. FAM. CODE ANN. (Vernon 1996 & Supp. 2000), with 40 TEX. ADMIN. CODE §§ 700.1310, .1313 (1999).

80. See TEX. FAM. CODE ANN. § 161.001(1)(Q).

81. See *id.*; see also 40 TEX. ADMIN. CODE §§ 700.1310, .1313 (1999). Since the codes conflict, it is therefore up to the assistant district attorney, supervisor, or caseworker to determine how the case will proceed. See TEX. FAM. CODE ANN. § 161.001 (Sampson & Tindall 2000) (explaining the ambiguity of Subsection (1)(Q) of the Code in the comment).

82. TEX. FAM. CODE ANN. § 161.001(1)(Q) (Vernon 1996 & Supp. 2000).

83. See *In re D.T.*, 34 S.W.3d. 625, 633-34 (Tex. App.—Fort Worth 2000, no pet. h.).

84. See Bloom, *supra* note 3, at 26; see also Dowdy, *supra* note 16 (reporting that women with longer prison sentences stand a greater chance of losing their children); but

dards of proof and evidence in favor of the parent when the case involves the involuntary termination of a parent-child relationship.⁸⁵ In addition, some courts have begun to pave the way so that certain factors, other than incarceration, can be considered prior to the termination of the parent-child relationship.⁸⁶ The consensus among courts is that mere incarceration of a parent alone should not constitute the determinate factor terminating the parent-child relationship.⁸⁷

In *Southerland v. Thigpen*,⁸⁸ the Fifth Circuit noted that an incarcerated woman does not lose all of her "protected liberty interests"⁸⁹ simply because of her incarceration.⁹⁰ Other courts support this notion and take the *Southerland* analysis one step further. Recent court decisions insist upon evidence of other wrong or criminal behavior, aside from the parent's incarceration, that supports termination.⁹¹ As a result, several courts have held that imprisonment alone is not sufficient to terminate an

see The Associated Press, *Prison Term Ruled Irrelevant in Severing Parental Rights*, *TUCSON CITIZEN*, Apr. 6, 2000, at 7C (reporting on a recently decided case that expressly stated "there is no specific prison term at which an inmate's parental rights must be severed").

85. See *Corning v. Tex. Dep't. of Protective and Regulatory Servs.*, No. 03-99-00009-CV, 1999 WL 795220, at 2 (Tex. App.—Austin Oct. 7, 1999, no pet. h.) (not designated for publication) (adhering to the clear and convincing standard of evidence in termination cases); *In re M.D.S.*, 1 S.W.3d 190, 197 (Tex. App.—Amarillo 1999, no pet.) (holding that termination requires incarceration plus evidence of any conduct on the part of the parent that has endangered the health and safety of the child); *In re B.S.T.*, 977 S.W.2d 481, 483 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (applying the clear and convincing standard of proof to termination cases).

86. See, e.g., *Tex. Dep't. of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

87. See *id.*; see also *In re D.T.*, 34 S.W.3d 625, 633 (Tex. App.—Fort Worth 2000, no pet. h.) (supporting the notion that *more* than a single act is needed to support termination of a parent-child relationship); *Crawford v. Crawford*, 569 S.W.2d 505 (1978) (finding that incarceration alone is not sufficient to establish endangerment of a child's physical or emotional well-being).

88. 784 F.2d 713, 716 (5th Cir. 1986). The court revealed that an incarcerated woman's right to see her child is outweighed by the prison system's need to maintain order. See *id.* at 716. However, the *Southerland* court did not discuss the right of a woman to maintain her parental rights to her child. See *id.*

89. *Id.* at 715.

90. See *id.* at 716.

91. See *Boyd*, 727 S.W. 2d 531; *In re D.T.*, 34 S.W.3d 625 (holding that abandonment cannot be inferred from incarceration alone); *In re M.D.S.*, 1 S.W.3d 190, 199 (Tex. App.—Amarillo 1999, no pet.) (holding that termination requires incarceration plus evidence of any conduct on the part of the parent that has endangered the health and safety of the child); *In re S.D.H.*, 591 S.W.2d 637, 638 (Tex. Civ. App.—Eastland 1979, no writ) (holding that imprisonment does not constitute abandonment); *H.W.J. v. State Dep't of Pub. Welfare*, 543 S.W.2d 9, 11 (Tex. Civ. App.—Texarkana 1976, no writ) (holding that imprisonment is not considered abandonment).

incarcerated mother's parental rights based on the determination that she had abandoned her child.⁹²

In *Texas Dep't of Human Services v. Boyd*,⁹³ the Texas Supreme Court held that a parent's misconduct resulting in incarceration is an act of endangerment to the child and should be considered in a termination proceeding.⁹⁴ Upon consideration of incarceration, if a court finds that the evidence does not support a course of conduct that places the child in danger, then the court cannot reasonably find that termination is appropriate.⁹⁵ Nevertheless, some courts believe that if the evidence, including the imprisonment of a parent, shows a course of conduct that endangers the child's physical or emotional well being, termination is an appropriate finding.⁹⁶

Other courts argue that incarceration alone does not constitute "conduct that endangers the physical or emotional well-being of the child."⁹⁷ These courts have instead held that if the trier of fact finds that "imprisonment was based upon a certain type of voluntary, deliberate, and conscious course of conduct, then such conduct endangers the emotional well-being of the child."⁹⁸ Accordingly, the *Boyd* court stated that while proof of actual injury was not necessary, endangerment could simply mean to jeopardize. Thus, the *Boyd* court concluded that imprisonment is still a factor in determining endangerment.⁹⁹

In response, some courts have determined that the trier of fact should only consider imprisonment as additional evidence.¹⁰⁰ As a result, many

92. See *In re D.T.*, 34 S.W.3d at 632 (holding that abandonment cannot be inferred from incarceration alone); *In re M.D.S.*, 1 S.W.3d at 199 (holding that imprisonment alone does not constitute child endangerment); *In re S.D.H.*, 591 S.W.2d at 638 (holding that imprisonment does not rise to the level of abandonment); *H.W.J.*, 543 S.W.2d at 11 (holding that merely because a person is imprisoned does not mean that they have abandoned their child).

93. 727 S.W.2d 531 (Tex. 1987).

94. See *id.*

95. *Id.*

96. See *In re D.E.G.*, No. 01-99-00143-CV, 2000 WL 145109 (Tex. App.—Houston [1st Dist.] Feb. 10, 2000, n.w.h.) (not designated for publication); *In re M.D.S.*, 1 S.W.3d 190; *In re J.N.R.*, 982 S.W.2d 137, 141 (Tex. App. —Houston [1st Dist.] 1998, no pet.).

97. See *Boyd*, 727 S.W.2d at 533; see also *In re D.T.*, 34 S.W.3d 625. The *In re D.T.* court found that a parent's imprisonment as a result of writing bad checks did not rise to the level of conduct that endangered a child. See *id.*

98. *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—Eastland 1999); see, e.g., *In re J.N.R.*, 982 S.W.2d 137 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.); *In re Guillory*, 618 S.W.2d 948 (Tex. App.—Houston [1st Dist.] 1981, no writ).

99. See *Boyd*, 727 S.W.2d at 533.

100. See, e.g., *Corning v. Tex. Dep't of Protective & Regulatory Servs.*, No. 03-99-00009-CV, 1999 WL 795220, at 3 (Tex. App.—Austin Oct. 7, 1999, no pet. h.) (not designated for publication).

courts consistently hold that imprisonment alone should not be the only factor in terminating parental rights based on abandonment.¹⁰¹

Presently, the Texas Supreme Court has provided little guidance to the lower courts regarding what other factors to consider, besides incarceration, when determining whether or not to terminate parental rights.¹⁰² Weighing a parent's incarceration status¹⁰³ with the best interest factors established in *Holley v. Adams*¹⁰⁴ should result in a balanced decision for the family. The *Holley* factors include:

(A) desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.¹⁰⁵

Generally, most courts do not recognize that incarcerated parents maintain a constitutional right to raising their children.¹⁰⁶ In fact, many courts believe that the exercise of certain constitutional rights, including the rearing of a child, is incompatible with incarceration.¹⁰⁷ Moreover, courts suggest that a parent's right to rear his or her child should also be restricted in light of the penal system's goals and policies.¹⁰⁸ Accordingly, the Fifth Circuit supported the separation of a prisoner from his or her child, a restriction otherwise deemed protected, because it believed that separation is compatible with incarceration and with the maintenance of legitimate penalogical concerns.¹⁰⁹

101. See, e.g., *id.*; *Jordan v. Hancock*, 508 S.W.2d 878, 881 (Tex. App.—Houston [14th Dist.] 1974, no writ).

102. See *In re D.T.*, 34 S.W.3d 625, 637 (Tex. App.—Fort Worth 2000, no pet. h.).

103. The courts can consider, for example, length of incarceration, reason for incarceration, and the parent's progress while in the facility.

104. 544 S.W.2d 367 (Tex. 1976).

105. *Id.* at 371-72.

106. See, e.g., *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986); see also *Pendergrass v. Toombs*, 546 P.2d 1103, 1104 (Or. App. 1976) (holding that an inmate's right to rear the child is a right that is incompatible with incarceration).

107. See, e.g., *Pendergrass*, 546 P.2d at 1103-1104.

108. See *Hudson v. Palmer*, 468 U.S. 517 (1984); see also *Pell v. Procunier*, 417 U.S. 817 (1974) (recognizing that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights").

109. See *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989); *Southerland*, 784 F.2d at 716.

2. The Clear and Convincing Evidence Standard

The Supreme Court of the United States has historically recognized that parents have a constitutional right to rear their child and to make decisions in matters of family relationships.¹¹⁰ Moreover, the Court has held that such a right is a fundamental right protected by the Fourteenth Amendment of the United States Constitution.¹¹¹ Similarly, Texas courts have held that "[t]he natural right existing between parents and their children is of constitutional dimensions."¹¹² As a result, the degree of proof required in termination cases is clear and convincing evidence,¹¹³ which is met when the trier of fact arrives at "a firm belief or conviction as to the truth of the allegations" asserted.¹¹⁴ In fact, Texas courts have stated that more than a scintilla of evidence must be brought forth to prove an endangering course of conduct on the part of the parent.¹¹⁵ Accordingly, some courts have determined that in order to justify termination, a

110. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (noting a parent's freedom to direct the upbringing of their children is constitutionally protected); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (supporting the protection of a parent's right to bring up their children); see, e.g., *Roe v. Wade*, 410 U.S. 959 (1973) (holding that women have a constitutionally protected right to make decisions regarding family matters); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977) (holding a statute unconstitutional because it prohibited distribution and advertisement of non-prescription contraceptives).

111. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that the Due Process Clause of the Fourteenth Amendment demands more than a preponderance of the evidence in termination cases); *Roe*, 410 U.S. 959 (determining that the Fourteenth Amendment's concept of liberty encompasses a woman's right to terminate her pregnancy); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (expanding the notion that the Due Process Clause of the Fourteenth Amendment protects the integrity of the family unit); *Pierce*, 268 U.S. 510 (supporting a parent's right to direct the upbringing of their children); *Meyer*, 262 U.S. 390 (establishing the doctrine that a parent's right to rear their child is protected by the Constitution); *Doe v. Pub. Health Trust*, 696 F.2d 901, 909 (11th Cir. 1983) (holding that parental rights are protected by the Constitution); *Dike v. School Board*, 650 F.2d 783, 786 n.1 (5th Cir. 1981) (holding that the Constitution provides protection for parental rights); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (holding that parents' rights are constitutionally protected).

112. *In re J.W.T.*, 872 S.W.2d 189, 194-95 (Tex. 1994); *In re B.S.T.*, 977 S.W.2d 481, 483 (Tex. App.—Houston [14th Dist.] 1998); see also *Holick*, 685 S.W.2d 18 (Tex. 1985).

113. See *Santosky*, 455 U.S. at 769-70; see also *In re B.S.T.*, 977 S.W.2d 481, 484 (Tex. App.—Houston [14th Dist.] 1998) (requiring the clear and convincing standard of evidence in termination cases); *Fleisher*, *supra* note 57, at 313 (interpreting the court's discussion of the clear and convincing standard requirement established in *Santosky v. Kramer*).

114. See TEX. FAM. CODE ANN. § 101.007 (Vernon 1996 & Supp. 2000); see also *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (establishing support for the Texas Family Code's clear and convincing standard); *In re B.S.T.*, 977 S.W.2d at 484 (supporting Texas' clear and convincing standard discussed by the *In re G.M.* court).

115. See *In re D.T.*, 34 S.W.3d 625, 631-32 (Tex. App.—Fort Worth 2000, no pet. h.) (requiring that factually sufficient evidence be produced to support a finding that a parent endangered a child); see also *In re D.L.N.*, 958 S.W.2d 934, 939 (Tex. App.—Waco 1997)

heightened level of proof such as "clear and convincing evidence" should be required.¹¹⁶ The level of evidence required to terminate such a right must therefore rise to the level of clear and convincing evidence, a standard required by due process.¹¹⁷

Furthermore, courts still agree that since a constitutional right is involved, termination proceedings should be strictly scrutinized.¹¹⁸ These and other courts have firmly held that strict scrutiny should be applied in favor of the parent when determining cases involving involuntary termination statutes.¹¹⁹

The Texas Supreme Court, however, has not provided any guidance regarding the varying standard of proof applicable to trial and appellate courts when terminating parental rights. Currently, the standard of proof in trial courts is the clear and convincing standard established by the United States Supreme Court in *Santosky v. Kramer*.¹²⁰ The *Santosky* Court held that a state must prove the allegations for termination by clear and convincing evidence, as required by due process, before the state may completely sever the parent-child relationship.¹²¹ However, many Texas appellate courts only apply the preponderance of the evidence standard, which requires a less stringent degree of proof than the one required at the trial level.¹²² For example, the court in *In re D.L.N.*¹²³ noted that

(declaring that evidence legally and factually sufficient to support termination of parental rights is needed).

116. See *In re D.T.*, 34 S.W.3d at 629-30; *Corning v. Tex. Dep't of Protective & Regulatory Servs.*, No. 03-99-00009-CV, 1999 WL 795220 (Tex. App.—Austin Oct. 7, 1999, no pet. h.) (not designated for publication); *In re B.S.T.*, 977 S.W. 2d 481 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

117. See TEX. FAM. CODE ANN. § 161.001 (Vernon 1996 & Supp. 2000); see also *In re K.C.M.*, 4 S.W.3d 392, 395 (Tex. 1999) (restating the clear and convincing standard in the TFC).

118. See *Corning v. Tex. Dep't of Protective & Regulatory Servs.*, No. 03-99-00009-CV, 1999 Tex. App. WL 795220 (Tex. App.—Austin Oct. 7, 1999, no pet. h.) (not designated for publication) (adhering to the clear and convincing standard of evidence in termination cases); *In re M.D.S.*, 1 S.W.3d 190, 197 (Tex. App.—Amarillo 1999, no pet.) (stating that termination cases should be strictly scrutinized and that the clear and convincing standard of proof apply); *In re B.S.T.*, 977 S.W.2d at 484 (applying the clear and convincing standard to termination cases).

119. See *In re D.T.*, 34 S.W.3d at 630 (indicating the need for strictly construing termination statutes in favor of the parent); see also *In re K.C.M.*, 4 S.W.3d at 395 (stating that the presumption in termination cases is to maintain the parent-child relationship); *In re C.D.*, 962 S.W.2d 145, 146 (Tex. App.—Fort Worth 1998, no pet.) (stating that termination proceedings should be strictly scrutinized).

120. 455 U.S. 745, 747-48 (1982).

121. See *id.*

122. See *Spurlock v. Tex. Dep't of Protective & Regulatory Servs.*, 904 S.W.2d 152, 155-56 (Tex. App.—Austin 1995, writ denied); *In re W.S.*, 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no writ); *In re J.F.*, 888 S.W.2d 140, 141 (Tex. App.—Tyler 1994,

since the Texas Supreme Court had not directly addressed this issue, it would continue to apply the preponderance of the evidence standard in involuntary termination cases.¹²⁴ The court also opposed the idea that it should apply the clear and convincing standard simply because the trial courts were directed to do so.¹²⁵

This form of judicial activism is disturbing, since the United States Supreme Court has already established that the termination of a parent-child relationship involves constitutional protections and strict evidentiary standards.¹²⁶ It would be constitutionally reasonable for state appellate courts to also apply the clear and convincing standard when considering the termination of a recognized constitutional right. As required by the *Santosky* court, all state trial and appellate courts should apply the clear and convincing evidentiary standard to cases in which the state is seeking termination of parental rights.¹²⁷

3. The Reasonable Efforts Standard

The Adoption Assistance and Child Welfare Act of 1980¹²⁸ established that CPS must demonstrate reasonable efforts have been made to preserve the family before the court can certify the termination of the parent-child relationship.¹²⁹ At least twenty-four states in the United States have legislation outlining the procedures courts must follow in determining whether reasonable efforts have been made in cases involving a custody determination.¹³⁰

no writ); *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ); *D.O. v. Tex. Dep't of Protective & Regulatory Servs.*, 851 S.W.2d 351, 353 (Tex. App.—Austin 1993, no writ).

123. 958 S.W.2d 934, 940 (Tex. App.—Waco 1997).

124. *See id.*

125. *See id.*

126. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (establishing constitutional protections for matters regarding the family). *Accord* *Roe v. Wade*, 410 U.S. 113, 168 (1973) (holding that determinations regarding the family invoke constitutional protections under the Due Process clause of the Fourteenth Amendment); *see generally* *Santosky v. Kramer*, 455 U.S. 745 (1982) (affording constitutional protections to cases involving termination of parental rights); *Stanley v. Illinois*, 405 U.S. 645 (1972) (implicating constitutional protections of the parent-child relationship).

127. *See Santosky*, 455 U.S. 745 (1982).

128. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter *Child Welfare Act*].

129. *See* 42 U.S.C. § 671(a)(15) (1994); *Child Welfare Act*, § 471 (1980) (codified as amended in scattered sections of 42 U.S.C.); *see also* AM. HUMANE ASS'N, *supra* note 20, at 4 (outlining the general intent of the Adoption Assistance and Child Welfare Act of 1980).

130. *See* Alice C. Shatton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 234 (1989-90). California, Florida, Geor-

In Texas, CPS has established a policy holding that "reasonable efforts" are attempts "to prevent or eliminate the need for removal of the child."¹³¹ However, there are currently no clear guidelines to help determine exactly when reasonable efforts are made or achieved. Balanced with determining the child's best interest, reasonable efforts must be established by the Department and then certified by the court prior to the removal of the child from the home.¹³² The determination of the court with regard to reasonable efforts, both prior to and after removal, is made on a case-by-case basis and is not guided by any established principles.¹³³

As evidenced by *Suter v. Artist M.*,¹³⁴ many courts continue to sidestep the fact that there is no clear definition for reasonable efforts.¹³⁵ The *Suter* court noted that, at the time the case was heard, there was "no . . . statutory guidance . . . as to how 'reasonable efforts' are to be measured."¹³⁶ However, the court failed to clarify what is required to meet this standard. Instead, the court simply held that the term reasonable efforts did not confer upon a private individual the right to bring forth a cause of action against the state for not making reasonable efforts.¹³⁷

4. The Rights of the Child and the Best Interest Standard

A child often suffers severe trauma and emotional turmoil when removed from his or her home; therefore, efforts to place a child with family after removal should be a priority.¹³⁸ Similarly, a child who is

gia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Massachusetts, Mississippi, Missouri, Nevada, New Mexico, New York, Ohio, Oklahoma, Oregon, Virginia, Washington, and Wisconsin implemented statutory reasonable effort schemes by 1990. *See id.* at 234 n.37-38.

131. Tex. Dep't of Protective & Regulatory Servs., *supra* note 44; *see also* 42 U.S.C. § 671(a)(15) (1994); AM. HUMANE ASS'N, *supra* note 20, at 325.

132. *See* 42 U.S.C. § 671(a)(15) (1994); TEX. FAM. CODE ANN. § 262.113(1) (Vernon 1996 & Supp. 2000); AM. HUMANE ASS'N, *supra* note 20, at 325 (indicating that it is the Department's duty to make reasonable efforts to preserve the family, while it is the court's duty to determine whether the Department's efforts were reasonable).

133. *See* 42 U.S.C. § 671(a)(15) (1994); TEX. FAM. CODE ANN. §§ 262.101(2), .201(3); (Vernon 1996 & Supp. 2000); *see also* AM. HUMANE ASS'N, *supra* note 20, at 325. The textbook, a book that is provided to every caseworker during training, does not provide caseworkers with a clear understanding of reasonable efforts. *See* AM. HUMANE ASS'N, *supra* note 20. This is an example of the lack of a strict definition for reasonable efforts within the Department.

134. 503 U.S. 347 (1992).

135. *See id.* at 359-64.

136. *Id.* at 360.

137. *See id.* at 364.

138. *See* Braveman & Ramsey, *supra* note 8, at 453-54 (quoting congressional testimony given by The Association for Children of New Jersey regarding the State's reasona-

separated from his or her mother because of her incarceration also suffers emotionally.¹³⁹ A child's bond with a mother does not disappear as a result of the mother's incarceration, and therefore, this bond must be fostered, not terminated.¹⁴⁰ Given that it is important to preserve the family and to primarily attempt to place children with relatives or family friends, children who are placed in foster care should be ensured that contact with their mother will continue, not because it is what the parent is entitled to, but because continued contact and visitation with the parent is in the best interest of the child.¹⁴¹

In addition to determining whether a parent has committed one of the acts outlined in section 161.001(1) of the Texas Family Code,¹⁴² a court has the duty to determine, prior to termination of a parent's rights, whether the termination of the relationship is in the child's best interest.¹⁴³ Although the best interest standard allows a court to consider presumptions against an incarcerated parent maintaining custody of a child,¹⁴⁴ the standard is an inseparable and necessary part of custody determinations. In order to determine whether termination of the parent-child relationship is in the child's best interest, the court should consider the *Holley* factors individually in addition to the factors established by the TFC.¹⁴⁵

ble efforts requirement). *But see* TEX. DEP'T OF PROTECTIVE & REGULATORY SERVS., *supra* note 30 (citing relative placement as only one of the few alternatives for placement).

139. See Christina J. Kampfner, *Post Traumatic Stress Reactions in Children of Imprisoned Mothers*, in CHILDREN OF INCARCERATED PARENTS 89 (Katherine Gabel & Denise Johnston eds., 1995); *see also* Young & Smith, *supra* note 8 (stating that children of incarcerated women face similar effects as children whose parent has passed away); Morales, *supra* note 3, at 5 (discussing the various negative effects of a mother's incarceration on children).

140. See Kampfner, *supra* note 139, at 98-99.

141. See Norman, *supra* note 49, at 126; *see also* Young & Smith, *supra* note 8 (citing a study conducted by the National Council on Crime and Delinquency that caregivers "believed that contact with the incarcerated mother [was] helpful to the child").

142. See TEX. FAM. CODE ANN. § 161.001(1) (Vernon 1996 & Supp. 2000); *see also In re M.D.S.*, 1 S.W.3d 190, 197 (Tex. App.—Amarillo 1999, no pet.) (citing the general requirements for termination outlined in the Texas Family Code).

143. See TEX. FAM. CODE ANN. § 161.001(2) (delineating the best interest of the child standard).

144. See Ahrens, *supra* note 19, at 774.

145. See *In re M.D.S.*, 1 S.W.3d at 199-200 (citing *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976)). Both courts outline the different things a court should consider when determining the best interest of the child. *See id.* The factors currently outlined in the TFC include:

- (1) the child's age and physical and mental vulnerabilities;
- (2) the frequency and nature of out-of-home placements;
- (3) the magnitude, frequency, and circumstances of the harm to the child;

Some courts presume that the child's best interest is served by maintaining the parent-child relationship with the child's natural parent.¹⁴⁶ Furthermore, courts have relied on balancing the totality of the circumstances and evidence with the factors set out in *Holley* in determining whether or not to terminate a parent's rights.¹⁴⁷ In fact, the *In re K.C.M.*

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the department or other agency;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child . . .

(c) In the case of a child 16 years of age or older, the following guidelines should be considered by the court in determining whether to adopt the permanency plan submitted by the department:

(1) whether the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living; and

(2) whether this transition is in the best interest of the child.

TEX. FAM. CODE ANN. § 263.307(b) (Vernon 1996 & Supp. 2000).

146. See *In re K.C.M.*, 4 S.W.3d 392, 399 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); see also *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (favoring a presumption in maintaining the family as serving the best interest of the child); *Allred v. Harris County Child Welfare Unit*, 615 S.W.2d 803, 806 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (citing *In re E.S.M.*, 550 S.W.2d 749, 757 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (stating that being with the parent is presumed to be in the child's best interest).

147. See, e.g., *Holley v. Adams*, 544 S.W.2d at 371-72; *In re K.C.M.*, 4 S.W.3d at 399.

court reversed a judgment terminating an incarcerated mother's rights after evidence was brought forth to show that the mother had turned her life around in jail.¹⁴⁸ In that case, the court determined that termination was unjust and against "the great weight and preponderance of the evidence."¹⁴⁹

In balancing the child's best interests against the presumption that the child is best served by maintaining the parent-child relationship, the court should consider other factors in addition to the factors outlined in the TFC.¹⁵⁰ The factors available under the TFC allow a court to presume that even the smallest deficiencies make a child's family dysfunctional, and therefore it is easier for the court to determine that any slightly dysfunctional placement is not in the best interest of the child.¹⁵¹ Thus, consideration of the Family Code factors alone makes it more difficult for children to be placed with certain relatives.

IV. THE IMPACT ON INCARCERATED WOMEN

While there are many cases involving incarcerated fathers' attempts to maintain their parental rights, women offenders are particularly at risk for termination of their parental rights.¹⁵² Women have historically been treated differently upon entering the prison system and, in turn, are affected in different ways than men.¹⁵³

There are several reasons for the disparate impact on women offenders. The primary reason is that single mothers have historically held the care, custody, and control of her child.¹⁵⁴ The following table is an exam-

148. See *In re K.C.M.*, 4 S.W.3d at 399; see also *In re D.E.G.*, No. 01-99-00143-CV, 2000 WL 145109, at 3 (Tex. App.—Houston [1st Dist.] Feb. 10, 2000, n.w.h.) (not designated for publication) (reversing a trial court's finding that a parent's incarceration endangered the child).

149. See *In re K.C.M.*, 4 S.W.3d at 399.

150. See TEX. FAM. CODE ANN. § 263.307(b).

151. According to an August 2000 Bureau of Justice Statistics report, there was a 98% increase in the number of minors with an imprisoned mother between 1991 and 1999. See MUMOLA, *supra* note 4, at 2.

152. See Johnston & Gabel, *supra* note 54; see also Dowdy, *supra* note 16, at B1 (pointing to the Adoption and Safe Families Act of 1997 as having a great impact on an incarcerated woman's loss of parental rights); Dressel et al., *supra* note 59, at 90-94 (affirming the belief that incarcerated mothers stand a greater chance of losing their parental rights).

153. See *Pitts v. Thornburgh*, 866 F.2d 1450, 1452 n.2 (1989); see also Genty, *supra* note 14, at 167.

154. See Bloom, *supra* note 3, at 25 (stating "seventy-three percent of incarcerated women reported that they had custody of their children at the time of their arrest"); see also Kampfner, *supra* note 139, at 89 (stating that the majority of incarcerated mothers were their children's primary caretaker).

ple of the disproportionate impact incarceration has on the mother-child relationship as opposed to the father-child relationship.

TABLE 1.¹⁵⁵

Percentage of State Inmate Parents, 1997		
	Male	Female
Parents who lived with their children prior to admission	43.8%	64.3%
Current caregiver*		
Child's other parent	89.6%	28.0%
Child's grandparent	13.3	52.9
Other relative	4.9	25.7
Foster home/Agency	1.8	9.6
Friends/Other	4.9	10.4

*Some prisoners had children in different homes.

Another factor for the disparate treatment of women is the lack of contact with their children.¹⁵⁶ Women offenders do not receive appropriate services in prison to help them achieve the requirements for reunification established by CPS.¹⁵⁷ Due to their limited contact and deficient services, they are unable to maintain a mother-child bond and are unable to practice any parenting skills they might have learned during their incarceration.¹⁵⁸ For instance, in the District of Columbia prison system, women are housed farther away from the city than men, thereby resulting in a substantial restriction on family visitation.¹⁵⁹

155. See MUMOLA, *supra* note 4, at 2; see also Beckerman, *supra* note 10, at 514.

156. See Johnston & Gabel, *supra* note 54, at 17-18; see also BLOOM & STEINHART, *supra* note 9, at 26 (discussing their survey of women in prison that found that over half of the women surveyed had not seen their children since their incarceration); Norman, *supra* note 49, at 128-29; Julie A. Norman, *Parent-Child Visitation in the Jail or Prison*, in CHILDREN OF INCARCERATED PARENTS 135-142 (Katherine Gabel & Denise Johnston eds., 1995).

157. See Johnston & Gabel, *supra* note 54, at 17-18; see also BLOOM & STEINHART, *supra* note 9, at 43 (reinforcing the fact that it is almost impossible for incarcerated mothers to meet the established reunification goals set by the caseworker).

158. See Bloom, *supra* note 3, at 21; see also Beckerman, *supra* note 10, at 515 (citing the difficulties women have in obtaining visits with their children, especially with children placed in foster care); Block & Potthast, *supra* note 9, at 566 (1998) (discussing the many reasons some caregivers cite as reasons not to take the children to see their mother).

159. See *Pitts v. Thornburgh*, 866 F.2d 1450, 1452 (D.C. Cir. 1989); see also Young & Smith, *supra* note 52 (affirming that prison "[f]acilities are typically located in remote areas, sometimes hundreds of miles from the family's home, making visitation extremely difficult for families with limited resources").

In *Pitts v. Thornburgh*,¹⁶⁰ the court recognized that "because . . . women are imprisoned considerably farther from the District than are similarly situated male offenders . . . [the women] consequently suffer a substantial burden."¹⁶¹ However, the court declined to apply a reasonable relationship analysis to the case and determined that the burden was a valid result of a legitimate penalogical interest under a heightened scrutiny approach.¹⁶² In other words, the penal system's interest outweighed the interest that women have in visiting their children in prison and the interest children have in visiting their mothers.¹⁶³

Conversely, the *In re D.T.*¹⁶⁴ court ordered a new trial after the parental rights of a mother had been terminated.¹⁶⁵ One of the factual findings made by the court included that the mother was denied visitation with her child based on a Texas Department of Protective and Regulatory Services (TDPRS) policy stating that visitation was not in the child's best interest since the mother had been transferred to a facility outside the region where her son had been placed.¹⁶⁶

Although an individual cannot deny that a father's incarceration is a traumatic experience for families, children and families of incarcerated mothers are believed to have a substantially more difficult, complex, and traumatic experience.¹⁶⁷ It is said that the cost of a mother's incarceration is one that crosses much more than monetary lines.¹⁶⁸ A mother's incarceration, as compared with a father's, implicates policy and social

160. 866 F.2d 1450 (D.C. Cir. 1989).

161. *Id.* at 1453.

162. *See id.*

163. *See generally id.*

164. 34 S.W.3d 625 (Tex. App.—Fort Worth 2000, no pet. h.).

165. *See id.* Similarly, the *In re K.C.M.* court reversed a lower court judgment terminating a mother's parental rights because of her incarceration. *See In re K.C.M.*, 4 S.W.3d 392, 399 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

166. *See In re D.T.*, 34 S.W.3d at 629.

167. *See Barry et al.*, *supra* note 49, at 148; *see also Beckerman*, *supra* note 10, at 517-19 (discussing the great shift in the family and the resulting negative impact on the whole family as a result of a mother's incarceration).

168. Teena Farmon, the warden at the Central California Women's Facility in Madera, California, believes that women in prison face a great deal of emotional pain from losing their children due to incarceration. Investigative Reports, *supra* note 75. Ms. Farmon said,

[T]he same way women care about their children, the women inmates continue to care. What destroys them, what hurts them more, when you see the pain more, is when something has happened with their children and the effect of their not being there is thrown in their face. The fact that they weren't there to help, they weren't there to make a difference.

Id.

institutions beyond the court and correctional system, and reaches across generations.¹⁶⁹

V. PROPOSAL

The number of mothers in prison is increasing at an alarming rate. Consequently, the percentage of children with incarcerated parents is simultaneously on the rise. However, the country has experienced a decline in services focusing on protection of the family and has seen a reduced emphasis on maintaining the parent-child relationship.¹⁷⁰ Subsequently, termination cases are likely to continue to increase nationwide. In an attempt to maintain the parental rights of incarcerated mothers, protect the best interest of the child, and ensure the preservation of the family, the following proposal provides a comprehensive framework and strict guidelines for both CPS and the courts.

The establishment of a more precise and strictly defined reasonable efforts standard within TDPRS and the Texas court system is a more modern and constitutionally based response to the need for family preservation.¹⁷¹ Currently, the Department is not required to prove that it has made reasonable efforts to preserve the family before removing the child from the home.¹⁷² Nevertheless, TDPRS must show that reasonable efforts to reunify a child with his or her family were made prior to moving towards termination of a parent's rights.¹⁷³

Before determining whether or not to terminate a parent's rights, the presiding judge must determine whether the Department has met this burden.¹⁷⁴ However, the recurring problem within the child welfare system is that there is no *clear* standard for the courts to follow. Com-

169. See Dressel et al., *supra* note 59, at 90.

170. See Novoa, *supra* note 15, at 24 (acknowledging that recent amendments to section 161.001 of the Texas Family Code have made "it easier to terminate the parental rights of a child who is in state custody"); Dressel et al., *supra* note 59, at 90 (explaining the development of a "family separation paradigm" in policies across the correctional and human services system).

171. See, e.g., Novoa, *supra* note 15, at 35-40 (emphasizing that public policy recognizes the desirability and success of family preservation, and asserting that successful family preservation programs often include the extended family).

172. See TEX. FAM. CODE ANN. §§ 262.101(2), .102(a)(2) (Vernon 1996 & Supp. 2000).

173. See *id.* § 161.003(a)(3).

174. See *id.* § 161.206(a); see also NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 95, available at <http://ppncjfcj.org/html/publications.html/publications.html> (last visited Apr. 14, 2001) (promoting the determination of whether the statutory grounds for termination have been met, prior to a court ordering termination).

pounding the lack of a clear standard is the fact that neither the legislature nor the courts have defined reasonable efforts.

The lack of clarity regarding the reasonable efforts standard requires that a strict definition of reasonable efforts be imposed. Moreover, the need for *timely* decision making and *equally timely* action on the part of both courts and CPS caseworkers is required in cases involving children of incarcerated women.¹⁷⁵

The reasonable efforts standard proposed in this comment consists of five parts, all of which are necessary in all cases involving the termination of parental rights. Its focus, however, is on removal and termination cases involving an incarcerated parent.

First, CPS contact with either an incarcerated mother or father after removal of their child shall be *timely*. Second, CPS contact with any known relatives after removal of a child shall be *timely*. Third, CPS shall *frequently* coordinate and conduct visits between the parent and the child. Once a case is set for termination, the State must show, by clear and convincing evidence, that it has made reasonable efforts to preserve the family. This burden shall be imposed on the State at *every* hearing on the case. Finally, a court shall make an official determination regarding whether the State has met the reasonable efforts standard.

The proposed standard is to function as follows: the caseworker must make contact with the incarcerated parent within five hours of picking up the child to ascertain whether there is a relative available for immediate placement. If locating information is obtained, telephone contact must be made with the relatives within two hours after obtaining the contact information. The caseworker is to then make a personal visit with the parent at the detaining facility within twenty-four hours of picking up the child in order to make physical contact with the parent. During this visit, the caseworker is to provide the parent with either the name and telephone number of the relatives with whom the child is placed or the Department's notice of removal, which is provided only to the parent and contains the caseworker's contact information.¹⁷⁶

In the event that the Department officially removes the child, the caseworker must then complete the necessary affidavit of removal.¹⁷⁷ In the original affidavit of removal submitted to the court at the initial hearing, the caseworker must include the names and locating information of

175. See, e.g., NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 174. In addition to recommending widespread changes within the court system, the Council emphasized the need for timeliness in all areas of court and agency practice. See *id.* at 14.

176. See 40 TEX. ADMIN. CODE § 700.1102 (1999) (identifying the need to provide parents with a written notice of removal).

177. See TEX. FAM. CODE ANN. § 262.106(b) (Vernon 1996 & Supp. 2000).

relatives provided by the parent or child. In addition, the caseworker must attach a certified document¹⁷⁸ demonstrating that contact with the parent was made within twenty-four hours of removal. At the initial hearing, the court shall make a finding specifically stating whether the Department made reasonable efforts to preserve the family up to that point in time.

If the child continues to remain in the state's custody prior to the adversary hearing scheduled for the fourteenth day after the signing of the temporary order, the caseworker must make a minimum of two additional contacts with the parent. These contacts are to be made under the pretext of gathering additional relative information. Prior to the adversary hearing, the caseworker must complete background checks of every relative. The report submitted by the caseworker at the adversary hearing is to include all the names and locating information for the possible placements and copies of the results of all background checks conducted. The court shall again make the determination of whether the Department has made reasonable efforts to preserve the family. If the court finds that the caseworker did not make the required contacts with the incarcerated parent, the court shall note it in the record and find that reasonable efforts were not made.

Upon submission of the service plan, submitted no later than the forty-fifth day after the temporary order,¹⁷⁹ the court must review the service plan and determine whether it is reasonable when balanced against the parent's incarceration. If the court determines that the service plan is not appropriate, the court shall order the Department to file an amended plan. This may be ordered at the status hearing to be held no later than the sixtieth day after the date of the temporary orders.¹⁸⁰

Prior to the status hearing, the Department must make a minimum of two additional contacts with either the incarcerated parent or a relative willing to take the child or assist in placing the child with another relative or family friend. The caseworker must document these contacts and include the name, address, and phone number of the relative with whom the contact was made. In addition, at least one visit between the parent and child must be arranged and completed by the caseworker.

At the status hearing, the caseworker must present evidence that the Department has met the efforts outlined in the checklist, and must bring

178. The document can include a general statement showing that the caseworker made contact with the parent within twenty-four hours of removal and can be signed and dated, including the time, by either the parent and caseworker or a detention officer and caseworker.

179. See TEX. FAM. CODE ANN. §§ 263.101-.102 (Vernon 1996 & Supp. 2000).

180. See *id.* §§ 263.201-.202.

forth supporting evidence. The court shall then make a finding, stating whether the Department met its burden of making reasonable efforts to help preserve the family. The court shall also order the Department to complete home studies of all eligible relatives, and designate a date by which the studies are to be completed and submitted to the court for review.

After the status hearing, the caseworker must again make at least three contacts with either a relative or the incarcerated parent. In addition, the caseworker must hold at least three visits between the child and the incarcerated parent before the Initial Permanency Hearing. The first visit and family contact is to be conducted no later than the ninetieth day of the temporary order, the second no later than the one hundred twentieth day of the temporary order, and the third no later than the one hundred fiftieth day of the temporary order. These visits are to be conducted to ensure that continued contact with the family is made, and that the caseworker and family continue to exchange information about possible placements for the child.

The contacts with family shall again be documented including the name, address, and phone number of the relative with whom the contact was made. Documentation of the contacts and visits, and any other information collected during the contacts, must be written and submitted to the court along with the Permanency Progress Report.

In addition to completing the visits and contacts prior to the initial permanency hearing, the caseworker must again complete background checks of every relative whose information was provided after the status hearing. This information is to also be included in the permanency progress report, and is to again include all the names, location, and background information of the possible relative placements.

Furthermore, the caseworker must complete a second affidavit stating whether the required contacts, visits, background checks, and any additional court ordered tasks have been accomplished. The caseworker's affidavit is to be submitted with the permanency progress report or filed with the court in advance of the initial permanency hearing.

The initial permanency hearing, to be held no later than one hundred eighty days after the temporary order is signed, involves discussing case progress and goals.¹⁸¹ At the initial permanency hearing, the caseworker must again present evidence that the Department has met the efforts outlined in the checklist. This may be supported by the affidavit previously submitted by the caseworker. The court shall then make another finding stating whether or not the Department satisfactorily met its burden to make reasonable efforts to preserve the family. If the Department has

181. *See id.* §§ 263.304-.306.

submitted any positive home studies, the court may order placement of the child with the eligible relatives. If no positive home studies are submitted and other eligible relatives are available, the court shall again order the Department to conduct and complete home studies of relatives.

Finally, the Department is charged with transitioning and placing the child or children into a relative placement upon a home study's approval. In order to ensure a speedy relative placement, it is recommended that the court grant the Department the authority to make the decision to place without having to return to court. Following a successful placement, the case should be dismissed, and a final order in the case entered.

Along with the aforementioned guidelines, the court shall enter a finding stating whether the Department has shown, by clear and convincing evidence, that reasonable efforts have been made. This finding is to be made, not only at the termination hearing, but also at every hearing held in the case. Moreover, the clear and convincing standard is to be followed by the state appellate courts and the Supreme Court of Texas as well. It is not enough that one court be bound by this standard, but necessary that all courts apply consistent evidentiary standards at each step of the termination process.

The standard is designed to apply to cases involving incarcerated parents and their child or children. It is a comprehensive standard and specifically applies to cases involving children who are either immediately placed with relatives or who continue to be placed under the State's supervision. In addition, it is applicable to children whose parents are jailed and then convicted and incarcerated, or whose parents are immediately incarcerated.

The "Checklist for CPS Intervention Upon Parental Incarceration" (Appendix 1) provides a more specific, step-by-step procedure to be followed by the caseworker upon a child's removal as a result of a parent's incarceration. The document is to be used as a checklist by the caseworker to ensure that all necessary steps are taken to preserve the family, and it is to function as a litmus test in determining whether reasonable efforts to preserve the family have been made. Some of the tasks included in the form are already required by the TFC. These tasks have been indicated with an asterisk (*) so that they may be distinguished from the tasks proposed here.

Ideally, the proposal and supporting document is to represent the reasonable efforts standard. Taken as a whole, the proposal represents the steps required to meet the reasonable efforts requirement. Therefore, completion of every task outlined in the proposal and included in the form is equal to successfully meeting the reasonable efforts requirement. The document is by no means all encompassing, but is designed to provide a more structured guideline to both CPS and state courts. The docu-

ment is, therefore, designed to present a total picture of the Department's efforts in preserving Texas families.

Courts have noted that the State has the burden to show, by clear and convincing evidence, that it is both in the child's best interest to terminate and that at least one of the other elements listed in the code exists.¹⁸² The proposal outlined above is, therefore, not all-encompassing. The key to effectively incorporating the above-outlined proposal is to implement a Family Code requirement that the reasonable efforts standard be proved, by clear and convincing evidence, at every step of the judicial process in termination cases involving incarcerated parents. Furthermore, the "Checklist for CPS Intervention Upon Parental Incarceration" and the step-by-step description outlined above needs to be included in the Administrative Code so that CPS understands exactly how to proceed in such cases.

Having experienced the casework process for several years, I can say with absolute certainty that some caseworkers do not fulfill the reasonable efforts requirement for family preservation, not because of fraud on the part of the caseworker, but because of an unclear and unstructured definition of reasonable efforts. The vagueness fosters a disproportionate finding by courts across the state regarding the reasonable efforts made by the Department. The problem with not having a standard definition or guideline for "reasonable efforts" is that reasonable efforts can be construed differently by one caseworker or judge, and therefore applied non-uniformly to cases. The reasonable efforts standard should therefore be *clear* and must be proved at every step of the judicial process.¹⁸³ Reasonable efforts are to be proven, beyond just a statement by the caseworker, but by clear and convincing evidence that *all* efforts for family placement and preservation have been exhausted. Nothing less is acceptable when children and constitutional considerations are involved.

VI. CONCLUSION

The establishment of the reasonable efforts standard in child abuse and neglect cases by The Adoption Assistance and Child Welfare Act of 1980 brought child welfare policy in line with legally established evidentiary guidelines. However, since no strict guidelines regarding the meaning of reasonable efforts were ever established, the system and the courts have imposed this "guideline" on a case by case basis.

182. *See id.* § 161.001.

183. The reasonable efforts standard should be proved at the initial hearing, the adversary hearing, the status hearing, all permanency hearings, and the termination hearing. *See generally* TEX. FAM. CODE. ANN. §§ 161.206-263.305 (Vernon 1996 & Supp. 2000).

With the number of children in foster care and the number of incarcerated mothers increasing, it is time that strict guidelines with regard to the reasonable efforts standard be imposed.¹⁸⁴ It is not enough that the courts use their own discretion and the mere word of the CPS caseworker to terminate a relationship that the Supreme Court of the United States has deemed to be deserving of constitutional protection.

The trend in public policy involving child abuse and neglect continues to be guided by the goal of enabling families to protect and appropriately parent their children.¹⁸⁵ The guiding principle behind child protective services is that helping a parent restore effective parenting skills is preferred when compared to placement of the child out of the home.¹⁸⁶ Similarly, focusing on preservation of the family, as opposed to out-of-home placement, is a much more cost-effective response to this social issue.¹⁸⁷

When the State is obligated to determine the future of a family, the rights of women as mothers cannot be overlooked. The importance of family with regard to protecting the well-being, safety, and rights of a child must also be considered in termination cases. The outlined proposal addresses the necessary considerations and attempts to protect the family and the rights of both parents and children. The proposal offers twenty-four tasks, each representing a detailed and task-oriented definition of reasonable efforts. The twenty-four tasks also symbolize each month that an incarcerated mother has before her rights are terminated. This proposal, however, represents only the minimally acceptable effort for preserving the constitutionally protected relationship between incarcerated parents and their children; ideally, much more reinforcement of this eroded right is in order.

The fact that a parent and child can be permanently separated as a result of a parent's incarceration is disturbing.¹⁸⁸ Furthermore, it is tragic

184. See Seymore, *supra* note 50, at 470 (stating that child welfare agencies will continue to see a significant increase in the number of children with incarcerated parents).

185. Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.) (appropriating funds to state public welfare agencies to strengthen services to children and families); see also AM. HUMANE ASS'N, *supra* note 20, at 3. See generally Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.) (codifying the idea that the Department should make "reasonable efforts" to keep families together).

186. See AM. HUMANE ASS'N, *supra* note 20, at 3; Tex. Dep't of Protective & Regulatory Servs., *supra* note 44 (affirming the Department's primary intent to preserve the family without having to remove the child from the home).

187. See AM. HUMANE ASS'N, *supra* note 20, at 3; Dowdy, *supra* note 16 (reporting that the child welfare system is being greatly burdened by the increase in incarcerated women).

188. Some also find that a mother's incarceration is often more disturbing than a father's since mothers are more often the primary caretakers of their children. See Weiser,

that a woman's parental rights can be terminated due to incarceration for reasons other than harming a child.¹⁸⁹ Texas statutes should not punish a mother and her innocent child by terminating her parental rights upon incarceration. Rather, statutes should protect the family and encourage extended family members to maintain strong relationships.

supra note 16 (recognizing that the incarceration of women, rather than men, has a greater impact on the family); *see also* Pat Swift, *Life Behind Bars Especially Grim for Women Inmates*, BUFFALO NEWS, Feb. 26, 2000, at C7 (emphasizing that a greater number of women with children are being incarcerated). Swift states that several studies show that women prisoners are more concerned with "retaining custody of and relationships with their children . . . [while] male prisoners [are] less affected by those issues." *Id.*

189. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon 1996 & Supp. 2000) (outlining what is required so that a court may order the involuntary termination of the parent-child relationship, including incarceration); *see also* Safe Families Act, § 103(a)(3)(E) (1997) (codified as amended in scattered sections of 42 U.S.C.) (codifying the requirement to terminate parental rights of a child in state custody for fifteen of twenty-two months); The Legal Aid Rights Project, *Testimony of the Legal Aid Society on the Effects of Incarceration on Families*, at http://www.legal-aid.org/testimony5_30.htm (last visited May 30, 2000) (describing the Adoption and Safe Families Act of 1997 as giving the states the power to terminate parental rights if a child is in foster care for fifteen of twenty-two months, which disproportionately affects incarcerated parents).

APPENDIX

CHECKLIST FOR CPS INTERVENTION UPON
PARENTAL INCARCERATION¹⁹⁰

Date Completed

- ___ 1. Contact with the incarcerated parent within five hours of picking up the child
- ___ 2. Telephone contact with possible placement within two hours of Task 1
- ___ 3. Personal visit with detained parent within twenty four hours of picking up the child
- ___ 4. Submit affidavit of completion or non-completion of 1, 2, and 3 at Initial hearing¹⁹¹
- ___ 5. First contact with parent after *Ex Parte* hearing
- ___ 6. Second contact with parent after *Ex Parte* hearing
- ___ 7. Completion of criminal history checks of all possible placements
- ___ 8. Adversary Hearing – within 14 days of Temporary Order¹⁹²
- ___ 9. Submit Service Plan – within 45 days of Temporary Order¹⁹³
- ___ 10. First contact with parent or relative after Adversary Hearing
- ___ 11. Second contact with parent or relative after Adversary Hearing
- ___ 12. Visit between child and incarcerated parent between Adversary and Status Hearing
- ___ 13. Status Hearing – within 60 days of Temporary Order¹⁹⁴
- ___ 14. Submission of amended service plan (if applicable)¹⁹⁵
- ___ 15. a. First contact with parent or relative no later than 90 days after Temporary Order

190. This form is designed to assist the caseworker in following specific procedures needed to ensure that the Department made a reasonable effort for preservation of the family. This form should be a permanent part of the child's file and should be submitted to the court prior to every hearing.

191. See TEX. FAM. CODE ANN. § 262.106 (Vernon 1996 & Supp. 2000).

192. See *id.* § 262.201.

193. See *id.* §§ 263.101-.106.

194. See *id.* §§ 263.201-.202.

195. See *id.* § 263.104.

- _____ b. Visit between child and incarcerated parent no later than 90 days after Temporary Order
- _____ 16. a. Second contact with parent or relative no later than 120 days after Temporary Order
- _____ b. Visit between child and incarcerated parent no later than 120 days after Temporary Order
- _____ 17. a. Third contact with parent or relative no later than 150 days after Temporary Order
- _____ b. Visit between child and incarcerated parent no later than 150 days after Temporary Order
- _____ 18. Completion of criminal history checks of all new possible placements – within 160 days of Temporary Order than 120 days after Temporary Order
- _____ 19. Submit affidavit of completion or non-completion of required contacts, visits, or court ordered activity – prior to Initial Permanency Hearing
- _____ 20. Initial Permanency Hearing¹⁹⁶ – within 180 days of Temporary Order¹⁹⁷
- _____ 21. Subsequent Permanency Hearing/s – no later than 120 days of Initial Permanency Hearing¹⁹⁸
- _____ 22. Approved Home Study – approved by court or department¹⁹⁹
- _____ 23. Relative Placement
- _____ 24. Final Order²⁰⁰

196. See TEX. FAM. CODE ANN. §§ 263.304, .306 (Vernon 1996 & Supp. 2000).

197. See *id.*

198. See *id.*

199. See 40 TEX. ADMIN. CODE § 700.1504 (1999).

200. See TEX. FAM. CODE ANN. §§ 263.401-.403.